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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 899

JOHN L. KINNISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 8-10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered November 18, 1946 (R. 11). On December 18, 1946, by order of the Chief Justice, the time within which to file a petition for a writ of certiorari was extended to and including January 17, 1947 (R. 12), and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether counts 1 and 3 of the indictment fail to state offenses under Section 2591 (a) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The Marihuana Tax Act of August 2, 1937, c. 553, 50 Stat. 551, as reenact^{ed}~~ed~~ in the Internal Revenue Code, 53 Stat. 279 ff, 26 U. S. C. 2590 ff, provides in pertinent part as follows:

SEC. 2591. (a) It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary [of the Treasury].

* * * * *

(c) The Secretary shall cause suitable forms to be prepared for the purposes before mentioned and shall cause them to be distributed to collectors for sale. The price at which such forms shall be sold by said collectors shall be fixed by the Secretary, but shall not exceed 2 cents each. Whenever any collector shall sell any of such forms he shall cause the date of sale, the name and address of the proposed vendor,

the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

SEC. 2596. Any person who is convicted of a violation of any provision of this subchapter or part VI of subchapter A of chapter 27 shall be fined not more than \$2,000 or imprisoned not more than five years, or both, in the discretion of the court.

SEC. 2600. The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties conferred or imposed upon him by this subchapter or part VI of subchapter A of chapter 27 upon such officers or employees of the Treasury Department as he shall designate or appoint.

The pertinent provisions of the regulations of the Treasury Department relating to the enforcement of the Marihuana Tax Act, issued by Stephen B. Gibbons, Acting Secretary of the Treasury, on September 1, 1937 (T. D. 281, 2 F. R. 1808-1809), are as follows:

In pursuance of the authority thus conferred upon the Secretary of the Treasury [i. e., by Section 2600, *supra*], it is hereby ordered:

I. RIGHTS, PRIVILEGES, POWERS AND DUTIES CONFERRED AND IMPOSED UPON THE COMMISSIONER OF NARCOTICS.

1. There are hereby conferred and imposed upon the Commissioner of Narcotics,

subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers and duties conferred or imposed upon said Secretary by the Marihuana Tax Act of 1937, so far as such rights, privileges, powers and duties relate to—

* * * *

(b) Prescribing the form of written order required by Section 6 (a) of the Act [section 2591 (a), *supra*], said form to be prepared and issued in blank by the Commissioner of Internal Revenue as hereinafter provided.

* * * *

II. RIGHTS, PRIVILEGES, POWERS AND DUTIES CONFERRED AND IMPOSED UPON THE COMMISSIONER OF INTERNAL REVENUE

1. There are hereby conferred and imposed upon the Commissioner of Internal Revenue, subject to the general supervision and direction of the Secretary of the Treasury, the rights, privileges, powers and duties conferred or imposed upon said Secretary by the Marihuana Tax Act of 1937, not otherwise assigned herein, so far as such rights, privileges, powers and duties relate to—

(a) Preparation and issuance in blank to Collectors of Internal Revenue of the written orders, in the form prescribed by the Commissioner of Narcotics, required by Section 6 (a) of the Act. * * *

* * * *

STATEMENT

After a jury trial, petitioner was convicted in the District Court for the District of Columbia on the first four counts of a six-count indictment charging violations of the Marihuana Tax Act. Counts 1 and 3, respectively, charged that he transferred specified quantities of marihuana in violation of Section 2591 (a) of the Internal Revenue Code (*supra*), in that the "transfer was not made in pursuance of a written order of the [transferee], on a form issued in blank for that purpose by the Commissioner of Internal Revenue"; counts 2 and 4 charged him with acquiring marihuana without having paid the required tax, in violation of Section 2593 (a) of the Internal Revenue Code, 26 U. S. C. 2593 (a). (R. 1-3, 4.) Petitioner was sentenced to imprisonment for a term of one to three years on each count, the sentences to run concurrently (R. 5).¹ On appeal to the United States Court of Appeals for the District of Columbia, the judgment of conviction was affirmed (R. 8-11).²

¹ Section 24-203 of the District of Columbia Code (1940) provides that on conviction of a felony, the defendant shall be sentenced for "a maximum period not exceeding the maximum fixed by law, and for a minimum period not exceeding one-third of the maximum sentence imposed."

² The record does not contain the evidence adduced at the trial.

ARGUMENT

Petitioner contends that counts 1 and 3 of the indictment are insufficient to support his conviction, because Section 2591 (a) of the Internal Revenue Code, upon which the counts are based, provides that a transfer of marihuana is illegal if not made in pursuance of a written order of the transferee on a form issued in blank for that purpose "by the Secretary [of the Treasury]" (*supra*, p. 2), whereas the counts allege that the transfers were not made pursuant to orders on forms issued "by the Commissioner of Internal Revenue" (*supra*, p. 5).³

³ Petitioner asserts, without supporting argument (Pet. 3), that counts 2 and 4 are also defective. These counts charge unlawful acquisition of marihuana in violation of Section 2593 (a) of the Internal Revenue Code. In his brief in the court below, petitioner attacked his conviction on these counts on the ground that the prosecution had failed to prove the venue of the offenses alleged. Since the court held that the convictions on counts 1 and 3 are valid, it did not pass on this contention, "because of the rule that in a case where separate sentences are imposed to run concurrently, and one count will support the sentence, the judgment will not be set aside although error may have been committed under one or more of the remaining counts" (R. 10). See *Hirabayashi v. United States*, 320 U. S. 81, 85.

Since the record does not contain the evidence adduced at the trial, it must be presumed that venue was sufficiently established. Counts 2 and 4, which charged the offenses in the language of the statute, are plainly sufficient. Accordingly, even if there were any merit in petitioner's contention in respect of counts 1 and 3, it would not avail him, since the sentence imposed would be supported by the convictions on counts 2 and 4.

This contention is clearly without merit in view of the express delegation of authority, permitted by the statute, whereby the Secretary empowered the Commissioner of Internal Revenue to issue the required order forms. In rejecting the contentions, the court below relied on its earlier decision in *Cromer v. United States*, 142 F. 2d 697, 698, certiorari denied, 322 U. S. 760. In that case the court upheld an indictment charging the sale of a drug in violation of the Harrison Narcotic Act (26 U. S. C. 2553, 2554), which alleged that the sale was not in pursuance of a written order on a form issued by the Commissioner of Internal Revenue, as against the contention that authority to issue such forms had actually been vested in the Commissioner of Narcotics. The court in that case held that "while it appears that the power to prescribe order forms has been delegated to the Commissioner of Narcotics, we are satisfied that the power to issue such forms is vested in the Commissioner of Internal Revenue" (142 F. 2d at 698).⁴ While the *Cromer* case is in point in the sense that, as here, the indictment referred to the officer to whom the actual authority to issue

⁴ In its opinion in the present case, in describing the situation involved in the *Cromer* case, the court below apparently confused the authority to prescribe the form of written orders, which was delegated by the Secretary to the Commissioner of Narcotics, with the authority to prepare and issue such forms in blank, delegated to the Commissioner of Internal Revenue (R. 9).

the order forms had been delegated, it is evident that the precise contention made in the present case was not involved. However, the same contention was made in *Nailling v. United States*, 142 F. 2d 551 (C. C. A. 6), certiorari denied, 316 U. S. 675, which the court below also cited (R. 10). That case, like the *Cromer* case, involved an indictment under Section 2554 (a) of the Internal Revenue Code, which alleged a sale not made in pursuance of a written order on a form issued in blank by the Commissioner of Internal Revenue, whereas the statute, like Section 2591 (a) which is involved here, specified the Secretary of the Treasury as the issuing authority. However, by appropriate delegations authorized by statute, the Secretary had empowered the Commissioner of Internal Revenue to issue such forms, and the court held the indictment good.⁵

⁵ *Fleisher v. United States*, 302 U. S. 218, upon which petitioner relies (Pet. 13), is clearly distinguishable. In that case, the first count of the indictment charged a conspiracy to possess stills without having them registered with the Collector of Internal Revenue. The Government conceded that "under the applicable law the charge should have been that there was failure to register the stills with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue." This Court held that the first count failed to state an offense. As pointed out by the court below in referring to the *Fleisher* case, R. S. § 3258, upon which the count was founded, originally required registration with the Collector of Internal Revenue, but "subsequent reorganization statutes, executive orders and regulations required that stills be registered with the Dis-

Petitioner also contends (Pet. 6-12) that counts 1 and 3 should have alleged the steps by which the authority to issue order forms was delegated by the Secretary of the Treasury to the Commissioner of Internal Revenue, so as to give him sufficient information of the delegation to permit him to challenge it, if he saw fit. This contention is without merit. The statute itself specifically advised petitioner that the Secretary of the Treasury was given the power to delegate any of his duties to subordinate officials (*supra*, p. 3); the indictment advised him that the Government was charging that he made transfers of marihuana not pursuant to written orders on forms issued by the Commissioner of Internal Revenue (*supra*, p. 5); and the regulations embodying the delegation of authority to that official were published in the Federal Register (*supra*, pp. 3-4).*

strict Supervisor of the Alcohol Tax Unit. The indictment there endeavored to charge a present offense in the language of a superseded statute. That is not this case" (R. 9-10). See *Benton v. United States*, 80 F. 2d 162 (C. C. A. 4), certiorari denied, 297 U. S. 705, for the history of the statutes involved in the *Fleisher* case.

*The claim (Pet. 12) that the delegation of authority to the Commissioner of Internal Revenue was invalid because made by an Acting Secretary of the Treasury (see *supra*, p. 3) is manifestly without force. In the absence of a showing to the contrary, it will be presumed that the Acting Secretary of the Treasury is empowered to exercise the duties of the Secretary. *Perry v. Page*, 67 F. 2d 635, 637-638 (C. C. A. 1); see also, *Anderson v. P. W. Madsen Inv. Co.*, 72 F. 2d 768, 771 (C. C. A. 10). There is no showing here that the Acting Secretary was not lawfully authorized to issue the regulations in question.

CONCLUSION

The case was correctly decided below. There is no conflict of decisions or question of importance involved. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY 1947.